(1) 89-1275

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSELLA O'GRADY and FRANK O'GRADY,

Petitioners,

vs.

ROBERT I. OBERHAND, M.D.; JOSEPH DiLALLO, M.D.; PAUL R. FRANZ, D.C.; PHYLLIS LaFLAMME, R.N.; MARY C. MAJOR; and MARY ANN HAMBURGER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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February 5, 1990

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QUESTIONS PRESENTED

1. Where the trial court judge so confused the case as to take a special verdict on negligence when negligence was uncontested, may New Jersey deny petitioners a remedy?

2. May New Jersey require the fortuitous appearance of a juror witness by "sheer luck" before it grants a remedy for jury misconduct?

LIST OF PARTIES

The parties to this proceeding are listed in the caption. Summary judgment dismissing the complaint against Paul R. Franz, D.C. was granted without opposition, and plaintiffs voluntarily dismissed suit against Phyllis LaFlamme, R.N., Mary C. Major and Mary Ann Hamburger prior to the plaintiffs'

appeal to the Superior Court of the State of New Jersey, Appellate Division. Thus, the remaining defendants in this matter are Robert I. Oberhand, M.D., and Joseph DiLallo, M.D.

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MISCELLANEOUS:

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The petitioners Rosella O'Grady and Frank O'Grady respectfully pray that a writ of certiorari issue to review the judgment of the Superior Court of New Jersey, Appellate Division, entered in the above-entitled proceeding on April

20, 1989, affirming denial of petitioners' motion for a new trial in the Superior Court, Law Division, Union County.

OPINIONS BELOW

The order of the Supreme Court of New Jersey denying certification (Wilentz, C.J.) has not been reported. It is reprinted in the appendix hereto, p. 1a, infra.

The opinion of the Superior Court of New Jersey, Appellate Division (per curiam) has not been reported. It is reprinted in the appendix hereto, p. 3a, infra.

The denial of plaintiffs' motion for a new trial by the Superior Court of New Jersey, Law Division (Weiss, J.S.C.) has not been reported. It is reprinted in the appendix hereto, p. 4a, infra.

JURISDICTION

Petitioners filed their appeal in New Jersey Superior Court, Appellate Division, asserting, inter alia, that their rights under the due process clause of the fourteenth amendment to the Constitution of the United States had been violated. The appeal was argued on April 5, 1989. On April 20, 1989, their appeal was denied.

Petitioners sought certification from the Supreme Court of New Jersey. On September 8, 1989 their petition was denied.

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a) in that the Appellate Division of the Superior Court of New Jersey, the highest state court in which decision could be had, has denied their claim of right under the due process clause of

the fourteenth amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.J. CONST. art. I, para. 9.

The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes

by a jury of six persons. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of a jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury.

NEW JERSEY RULES OF COURT INVOLVED

N.J. Ct. R. 1:16-1. Interviewing Jurors Subsequent to Trial.

Except by leave of court granted upon good cause shown, no attorney or party shall himself or through any investigator or other person acting for him interview, examine or question any grand or petit juror with respect to any matter relating to the case.

N.J. Ct. R. 2:10-1. Motion for New Trial as Prerequisite for Jury Verdict Review; Standard of Review.

In both civil and criminal actions, the issue of whether a jury verdict was against the weight of the evidence shall

not be cognizable on appeal unless a motion for a new trial on that ground was made in the trial court. The trial court's ruling on such a motion shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law.

N.J. Ct. R. 4:9-2. Amendments to Conform to the Evidence.

When issues not raised by the pleadings and pretrial order are tried by consent or without the objection of the parties, they shall be treated in all respects as if they had been raised in the pleadings and pretrial order. Such amendment of the pleadings and pretrial order as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend shall not affect the result of the

trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings and pretrial order, the court may allow the pleadings and pretrial order to be amended and shall do so freely when the presentation of the merits of the action will be thereby subserved and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

N.J. Ct. R. 4:25-1(b)(16). Pretrial Conferences.

When entered, the pretrial order becomes part of the record, supersedes the pleadings where inconsistent therewith, and controls the subsequent course of action unless modified at or

before the trial or pursuant to R. 4:9-2 to prevent manifest injustice. The matter of settlement may be discussed at the sidebar, but it shall not be mentioned in the order.

N.J. Ct. R. 4:49-1(a). Motion for New Trial: Grounds of Motion.

A new trial may be granted to all or any of the parties and as to all or part of the issues on motion made to the trial judge. On a motion for a new trial in an action tried without a jury, the trial judge may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. The trial judge shall grant the motion if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly

appears that there was a miscarriage of justice under the law.

NEW JERSEY RULES OF EVIDENCE INVOLVED

N.J. Evid. R. 41. Evidence to Test a Verdict or Indictment.

Upon an inquiry as to the validity of a verdict or an indictment no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him to assent to or dissent from the verdict or indictment or concerning the mental processes by which it was determined.

NEW JERSEY RULES OF PROFESSIONAL CONDUCT INVOLVED

N.J. RPC 3.5. Impartiality and Decorum of the Tribunal.

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such

a person except as permitted by law.

NEW JERSEY MODEL
JURY CHARGE (CIVIL) INVOLVED

N.J. Model Jury (Charge) 7.11.
Proximate Cause--General Definition.

By proximate cause is meant that the negligence of the defendant was an efficient cause of the accident, that is, a cause which necessarily set the other causes in motion and was a substantial factor in bringing the accident about. It is defined as a cause which naturally and probably led to and might have been expected to produce the accident complained of.

STATEMENT OF THE CASE

1. The Headache

In the early evening of Friday, March 4, 1983, petitioner Rosella O'Grady was in the kitchen of her home cleaning up after dinner, having just finished eating the evening meal with

her husband Frank, her daughter Lisa, age 12, and her son Frank, age 15, when she was suddenly overcome by the pain of an intense headache. 19T136-9 to -11.* Before the month was out, Mrs. O'Grady would suffer a subarachnoid hemorrhage that would leave her a conscious, mute quadriplegic, confined to the hospital, able to communicate only by eye movement. 20T193-15 to 194-10.

She said to her husband, petitioner Frank O'Grady, "I got a sudden unbelievable headache." 19T136-15 to -18. The

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* The trial transcript is cited herein as T with the date of the proceeding prepended. "19T136-9 to -11" indicates proceedings of the second day of trial, March 19, 1987, page 136, lines 9 to 11. Trial was had in the Superior Court of the State of New Jersey, Law Division, before the Honorable Lawrence Weiss, J.S.C., sitting with a jury, on March 18-20 and 20-27, 1987. A motion for a new trial was heard and denied by Judge Weiss on April 24, 1987.

pain confined her to bed for the remainder of the weekend. 19T136-20 to 19T137-1.

On the morning of Monday, March 7, 1983, Mrs. O'Grady went to the office of Robert I. Oberhand, M.D., an otolaryngologist who had treated her over a course of time for sinus and allergies. 19T138-17, 139-16, 139-17. Dr. Oberhand examined Mrs. O'Grady's nose, throat and larynx, tested her neck extension, and palpated her back muscles. 19T62-23 to 19T63-2. He took little or no history. He diagnosed Mrs. O'Grady's problem as otolaryngological, gave her a cortisone injection into the tissues of her nose, a prescription for an antibiotic and instructions to return in one week. 19T63-4 to -7. Dr. Oberhand also

reiterated a previous recommendation that Mrs. O'Grady undergo a submucosal resection to correct a deviated septum, which he believed might be contributing to her disorder. During the week following, the headache persisted.

On Monday, March 14, 1983, Mrs. O'Grady returned to Dr. Oberhand. Dr. Oberhand examined Mrs. O'Grady's ears, nose and throat again, and took her blood pressure, which was slightly elevated (134/94). 19T66-14 to -21. He now concluded that the headache probably related to some spinal muscle or joint problem, outside his specialty, and wrote a referral letter to Mrs. O'Grady's internist, defendant Joseph DiLallo, M.D., which in part said:

Mrs. O'Grady is presently

> complaining of severe, disabling headaches. Pain begins at the base of the skull, and radiates over the top of her head to her forehead. She also has some pain in her cheeks. She has pain radiating down the cervical spinal area posteriorly. She is under treatment by a chiropractor for diffuse spinal problems.
>
> Sinus x-rays have been ordered, and the results are pending. I have referred Mrs. O'Grady back to you for treatment of cervical arthritis with medication or possibly with orthopedic consult for further evaluation. If her sinus x-rays are anything but normal, I will inform you immediately. I do not feel that her pains are related to an otolaryngologic problem at the present time. I will recheck her hearing in two months.

Oberhand Letter, Appendix p. 17a, infra.

Dr. DiLallo was not to see Dr. Oberhand's letter in time to do anything about Mrs. O'Grady's condition: an employee of Dr. DiLallo filed the letter before he could read it. 25T112-10 to -13.

On the afternoon of Wednesday, March 16, 1983, 12 days after the onset of the headache, it disappeared as suddenly as it had come. 19T147-1 to -4.

Fifteen days later, on March 31, 1983, Mrs. O'Grady suffered a massive subarachnoid hemorrhage that left her a conscious, mute quadriplegic. She has been hospitalized continuously since that day.

Mrs. O'Grady exhibits emotional and intellectual presence, and is able to communicate through a slow and tedious system of spelling out words and sentences by eye movement, using a letter board.

The petitioners believe that Mrs. O'Grady suffered a prodromal (L. prodro-

mus, "precursor") or "sentinel" subarachnoid bleed from an aneurysm at the first branching of her right middle cerebral artery, which aneurysm burst on March 31, 1983. Prodromal bleeds cause sudden painful headaches unlike any other headache which the patient has experienced. See, e.g., Ball, Pathogenesis of the "Sentinel Headache" Preceding Berry Aneurysm Rupture, 112 Canadian Med. A.J. 78-79 (1975). Properly done, an angiogram gives an almost unequivocal picture of all but the tiniest aneurysms. C. Rumbaugh, D. Kido & R. Baker, Cerebral Angiography: Technique, Indications and Hazards, in 1 Angiography 219 (H. Abrams ed. 3d ed. 1983).

Respondent Dr. Oberhand contended

that Mrs. O'Grady's headache was caused by one of a variety of medical conditions other than prodromal bleeding. Respondent Dr. DiLallo contended that even if he had been timely shown the referral letter, he would have taken no action.

2. The Subarachnoid Hemorrhage and its Results

On March 31, 1983, while shopping at Sears for a pair of ski pants, Mrs. O'Grady collapsed, and was taken unconscious to Muhlenberg Hospital in Plainfield, New Jersey. 19T149-4 to -6, -12 to -15. She was found to have suffered a subarachnoid hemorrhage. Mrs. O'Grady remained at Muhlenberg for approximately three and one-half months, during the first two of which she

remained in a coma. 20T191-17 to 192-1.

On August 8, 1983, the petitioner was transferred to Runnell's Hospital in Berkeley Heights, New Jersey, where she has been ever since. 20T192-14 to -23.

Mrs. O'Grady's general health is good, but she has no control over bodily functions. She wears diapers. 20T196-18 to 197-1. Mrs. O'Grady has had a tracheostomy. 20T202. She is unable to eat solids and has a gastrostomy tube inserted in her stomach. 20T197-18 to -25.

Mr. O'Grady has visited his wife for several hours virtually every day since the accident. He has endeavored to ensure that the quality of his wife's care is maintained. However, because of budgetary pressures on the hospital, the

quality of that care has declined; bed sores have been allowed to form.

3. Questions from the Jury

Petitioners' jury trial began on March 18, 1987, in the Superior Court of New Jersey, Law Division, Union County, the Honorable Lawrence Weiss, J.S.C., presiding. At 3:05 p.m. on March 26, 1987, the jury retired. 26T228-12. Loud voices were heard from the jury room. At approximately 3:35 p.m., a note was passed to the judge, 26T231-2. O'Grady Affidavit, Appendix p. 19a, infra. The transcript is not clear: That note appears to have contained the first and second questions from the jury. A second note containing the third question was passed next. O'Grady Affidavit, Appendix p. 19a, infra. What

was described by the Judge as "Note Three," containing the fourth question, a redaction of the first, was passed at 5:28 p.m. 26T237-19, -20. A fourth note containing question five was passed shortly before the jury was sent home for the evening at about 5:45 p.m. 26T247-1; 26T247-11, -12.*

Question I

The jury asked, "In Dr. Oberhand's deposition did he say continuous headache for 12 days or does he say series of disabling headaches?" 26T231-2 to -6.

The request puzzled the court and counsel. Nothing in that portion of Dr. Oberhand's deposition read to the jury

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* Counsel's reconstruction. The record contains no mention of the second note containing the third question.

as part of petitioners' case in chief seemed to answer the question. The Judge refused to give the jury the Oberhand deposition (only part of which had been read to the jury), and asked for clarification of the question. 26T232-5 to -14, 233-9 to -16.

Question II

The jury asked, "Does P-7 in evidence refer to Mrs. O'Grady's headache?" Exhibit P-7 was a graph prepared by petitioners' expert Dr. Bennett M. Derby plotting headache intensity against time. The Judge answered this second question in the affirmative. 26T235-14 to 236-3.

Question III

The jury's third question does not appear on the record. It involved only

a brief interchange during the continuing colloquy among court and counsel over the meaning of Question I.

In this question, the jury requested the deposition of petitioner Mr. O'Grady. This deposition had been used in the cross-examination of Mr. O'Grady on the issue of when Mrs. O'Grady's headache ended. The Judge refused the jury's request. O'Grady Affidavit, Appendix p. 20a, infra.

Question IV

The jury asked, "Did Dr. Oberhand in his testimony state that the complaint was a continuous headache between the 7th and 14th of March of 1983?" 26T237-21 to -24. In response to this question, the Judge read back a portion of the Oberhand deposition.

26T245-2 to 246-24. It appears that what the jury wanted was a different passage in the transcript, consisting of a portion of the viva voce cross-examination of Dr. Oberhand by trial counsel for petitioners. 26T238-20 to 239-25, 240-16 to 241-5, 243-12 to 244-22.

Question V

In response to the Judge's question of whether the jury wished to continue deliberation, the jury responded that they wished to go home and asked the Judge: "Would you read these lines to us again tomorrow morning?" 26T247-12 to -13. The Judge said that he would, and the same portion of Dr. Oberhand's deposition which had been read in response to question four was read back

the following morning. In a little more than one hour, the jury returned a verdict of no cause. O'Grady's Affidavit, Appendix p. 20a, infra.

4. The Alternative Passage

Dr. Oberhand was heard twice by the jury. On March 19, 1987, trial counsel for petitioners, with the aid of a secretary, read into the record substantial portions of Dr. Oberhand's deposition as part of the petitioners' case. 19T30 to 19T79. On March 25, 1987, Dr. Oberhand appeared in his own defense, 25T5, and was cross-examined by counsel for the petitioners. 25T66 to 25T94.

Dr. Oberhand's viva voce testimony of March 25, 1987 is more responsive to the jury's inquiry in questions one, four and five than is the deposition

testimony which the Judge had read back to the jury on the afternoon of March 26, 1987 and the morning of March 27, 1987. The viva voce testimony was as follows:

> Q. Now, Doctor, Mrs. O'Grady's complaints of headaches were such that you felt that it was not part of the your specialty; is that correct?
>
> A. Not on the first visit.
>
> Q. But you came to that conclusion by the 14th?
>
> A. Yes, I did.
>
> Q. When we are dealing with the 14th; it is the same headache?
>
> A. Yes, sir.
>
> Q. The same type of headache; correct?
>
> A. Yes.
>
> Q. The same headache that hasn't gone away for the entire week; correct?
>
> A. No, because I mention the plural headaches.
>
> Q. Well, Doctor, do you have any notation in there of having inquired of Mrs. O'Grady whether or not the headache went away?
>
> A. No, I do not.
>
> Q. Now, when you see here on the 14th you have a history of acute headaches; is that not

correct?

A. By March 14.

Q. By March 14?

A. I have headache that is almost two weeks old by this time, correct.

Q. You know the onset was acute; is that not correct?

A. Well, it was present for five days. I assume that the day before it was not there, so that it was of rapid onset rather then gradual, yes.

25T75-19 to 77-2.

REASONS FOR GRANTING THE WRIT

I. New Jersey so Applied its Law to Petitioners' Case as to Virtually Ensure Jury Mistake and Misconduct, and Such Mistake and Misconduct Followed

The courts of New Jersey have recognized that the state constitution's civil jury guarantee[1] would be meaningless absent public confidence in that mode of trial. "In order that there may be confidence in trial by jury it is necessary that the parties are to feel sure that verdicts are based on an

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1. The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of a jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury.

N.J. CONST. art. I, para. 9.

honest consideration of the evidence and not upon prejudice or sympathy." Panko v. Flintkote, 7 N.J. 55, 62, 80 A.2d 302, 306 (1951). The verdict must accord with the charge. Wright v. Bernstein, 23 N.J. 284, 294-95, 129 A.2d 19, 25 (1957). The charge must correctly reflect the law (Talmage v. Davenport, 31 N.J.L. 561 (E. & A. 1864)) on the questions fairly raised by the evidence. Ball v. Porter, 23 N.J. Super. 491, 494, 93 A.2d 223, 224 (App. Div. 1952) (citing Broadwell v. Nixon, 4 N.J.L. 362 (Sup. Ct. 1817)). The duty to charge correctly exists "whether such instructions are specifically requested or not." Grammas v. Colasurdo, 48 N.J. Super. 543, 552, 138 A.2d 553, 558 (App. Div. 1958).

Aspirations sometimes fail: In this matter New Jersey applied its law in two aspects so as to greatly increase the chances of jury mistake and in two others so as to produce jury misconduct.

A. The Charge Did Not Correctly Reflect the Law

In Evers v. Dollinger, 95 N.J. 399, 471 A.2d 405 (1984), and Hake v. Manchester Township, 98 N.J. 302, 486 A.2d 836 (1985), New Jersey adopted the loss of chance doctrine, set forth in Gardner v. National Bulk Carriers, 310 F.2d 284, 287 (4th Cir. 1962), cert. denied, 372 U.S. 913 (1963).

That doctrine holds a defendant liable when his misconduct diminishes plaintiff's chances of escaping from a predicament, even one for which the

defendant is not responsible; in effect it amounts to a diminution in the causation showing demanded of plaintiff. See Hake v. Manchester Township, 98 N.J. 302, 311, 486 A.2d 836, 841 (1985).

Here, petitioners asserted that, had Dr. Oberhand taken proper history, or had Dr. DiLallo, upon reading Dr. Oberhand's letter, called Mrs. O'Grady and inquired about her symptoms, either physician should have recognized the classical sign of a leaking aneurysm and referred her to a neurologist who could have diagnosed her condition and arranged for surgical treatment. The claim was that the negligence of Dr. Oberhand and the misconduct of the servant for whose omission Dr. DiLallo is responsible deprived Mrs. O'Grady of

her chance to escape from intercranial emergency.

In petitioners' case the trial court submitted the case to the jury employing a standard form proximate cause charge that took no account of loss of chance doctrine.[2] The New

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2. Model civil jury charges in New Jersey are prepared by a committee whose members are appointed by, but whose work product is not endorsed by, the Supreme Court. The proximate cause charge used here consisted in its entirety of one sentence of such a model charge. The portion used is here underlined.

> 7.11 PROXIMATE CAUSE--GENERAL DEFINITION
>
> By proximate cause is meant that the negligence of the defendant was an efficient cause of the accident, that is, a cause which necessarily set the other causes in motion and was a substantial factor in bringing the accident about. It is defined as a cause which naturally and probably led to and might have been expected to produce the accident complained of.

N.J. Sup. Ct. Comm. on Model Jury

Jersey Supreme Court has held that it is not error to submit a loss of chance case on such a charge, absent objection by trial counsel. Gaido v. Weiser, 115 N.J. 310, 311, 558 A.2d 845, 845 (1989). Nevertheless, use of this language to administer a diminished standard of causation increases the chance of jury mistake.

B. The Charge Did Not Accurately Address the Question Raised by the Evidence

The letter referring Rosella O'Grady to Dr. DiLallo was misfiled by his employee and not discovered until after she had suffered a subarachnoid hemorrhage which prompt referral and treatment might have prevented. 25T111-

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Charges (Civil), Model Jury Charges--Civil § 7.11, at 273 (1986).

24 to 112-13. Petitioners pleaded the negligence of the servant and Dr. DiLallo's responsibility therefor. Dr. DiLallo entered a general denial and pleaded specifically that his acts or omissions were not the proximate cause of the injury. Causation, not denial of negligence, was Dr. DiLallo's defense in the pretrial order.

> It is plaintiff's position that this alleged office mismanagement constituted a deviation from accepted standards and that based on Dr. Oberhand's letter, Dr. DiLallo should or could have provided follow-up medical attention to the plaintiff. It is Dr. DiLallo's position that even if he had seen the letter, he may not have been prompted to take follow-up measures at that point.

Excerpt (Rider 2) from Pretrial Order, Appendix p. 23a, infra.

At trial Dr. DiLallo contested neither employee negligence nor

vicarious responsibility; in effect, he conceded petitioners' contentions. See, e.g., 25T112-14 to 114-23 (DiLallo, direct). His expert's testimony on the standard of care was offered solely to the proposition that had he seen the letter, he would have had no duty to, and hence probably would not have, contacted, questioned and referred Mrs. O'Grady, 26T37-24 to 40-16 (Jacobsen, direct), despite the fact that he thought her headache "an alarming complaint," 25T123-22 to 124-6 (DiLallo, cross). The pretrial order supersedes the pleadings when inconsistent therewith. New Jersey Court Rule 4:25-1(b)(16). The pleadings may be treated as amended to conform to the proofs. New Jersey Court Rule 4:9-2. There was

no issue of negligence in the case between petitioners and Dr. DiLallo.

The trial court, without objection from Dr. DiLallo's counsel, 19T159-9 to 161-8, considered the possibility of directing a verdict on the issue of employee negligence and Dr. DiLallo's responsibility.

> Since I don't see how an office person, now that I've reviewed it, is malpractice. Now, whether or not their negligence is imputed, whether their negligence would be imputed to Dr. DiLallo, I may rule as a matter of law that they are, but it seems to me the filing of it may be a negligence count as well.

19T159-19 to -25. However, the court later chose to give a standard negligence charge, 26T191-8 to 198-9, and to propound a jury interrogatory as to Dr. DiLallo's negligence, 26T200-19 to -21. The jury returned a verdict of

no negligence in response to that interrogatory. 27T5-7 to -9.

C. A Substantial Portion of the Defense Evidence Was Irrelevant and Misleading

Respondent Dr. Oberhand had no obligation to prove anything; his was an element-attacking defense, not an affirmative one. He chose to devote most of his energy to the proposition that Mrs. O'Grady's headache was not caused by a sentinel bleed. His argument had two branches. The first was that an aneurysm located in the position of Mrs. O'Grady's would either hemorrhage massively or not bleed at all; it would not bleed prodromally. The second was to advance alternative hypothesis as to the cause of the headache. Dr. Oberhand did not attempt

to urge that the headache was intermittent rather than constant.

Dr. Howard Medinets, Dr. Oberhand's neurological expert, testified that any bleeding from Mrs. O'Grady's aneurysm would cause disastrous brain damage immediately: there is no such thing as a sentinel or warning bleed. Hence, he said, Mrs. O'Grady's headache could not have been the result of such a bleed. 25T150-1 to -21.[3]

Dr. Medinets and other defense

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3. Dr. Medinets testified that he recognized no general neurology text as definitive. 25T193-21 to 25T195-6. A diligent search of the medical literature has produced no authority supporting Dr. Medinets' view; to the contrary, the recognition of sentinel or warning bleeds from aneurysms like Mrs. O'Grady's is general. See, e.g., J. Pool & D. Potts, Aneurysms and Arteriovenous Anomalies of the Brain 47-48, 60, 64 (1965).

witnesses suggested seven alternative etiologies for Mrs. O'Grady's headache. Allergy is mentioned 13 times by defense witnesses or counsel, arthritis 23, deviated septum 27, migraine headache twice, neck sprain 12 times, sinusitis 19, and subluxation 3.

These other diseases fall into two groups: Those which might produce stiffness of the neck, or pain in the neck radiating upward to the back of the head (neck sprain, cervical arthritis, subluxation) and those which might give a frontal headache or sinus pain (allergic rhinitis or sinusitis, inadequate sinus drainage because of a deviated septum, sinusitis caused by bacterial infection). Dr. Oberhand made no attempt to offer proof as to

particulars about the characteristic onset or duration of severe headaches from the causes he propounded.[4] His

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4. Classic migraine headache is generally preceded by an aura that may include some vision loss in the visual field or visual prodromes, such as flashing lights or jagged lines. Hearing and motor impairment may also be involved. These headaches are primarily hemicranial (affecting half the head) and usually take the better part of an hour to reach the peak of their intensity. The pain involved is described as pulsing or throbbing; the headaches are recurring, not constant. B. Alpers, Clinical Neurology 144, 149 (5th ed. 1963); Graham, Seven Common Headache Profiles, 13 Neurology 16 (1963); S. Diamond & J. Dalessio, The Practicing Physician's Approach to Headache 11-26 (3d ed. 1982); A. Friedman, Recurring Headache, 1 Primary Care 275 (1974); M. Lee & J. Resch, Practical Clinical Neurology for the Otolaryngologist, in Otolaryngologist 866 (1980); Emergency Medicine, Concepts and Clinical Practice 178-81 (P. Rosen ed. 1983).

Cluster headaches are also generally hemicranial and involve a boring or throbbing pain that may be located behind one eye, causing weeping in that eye. These headaches are sudden, regularly recurring attacks that

theory seemed to be that a frontal headache caused by one of one group of diseases coincided with neck stiffness and pain caused by one of the other group of diseases, and the two symptoms together mimicked the headache of a leaking aneurysm: Mrs. O'Grady had the headache she described, he suggests; it just did not come from a sentinel bleed.

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may take place at hourly or daily intervals for a period of time and then disappear. The individual headaches themselves rarely last for more than two hours. Id.

Sinus headache usually begins gradually in the morning and decreases in severity during the day. S. Diamond & J. Dalessio, The Practicing Physician's Approach to Headache 11-26 (3d ed. 1982). Sinus headaches tend to have a characteristic temporal pattern: They begin sometime after the sufferer has arisen in the morning, rapidly reach a peak, and then diminish over the course of the day. B. Alpers, Clinical Neurology 144, 149 (5th ed. 1963).

In the Appellate Division, and again in proceedings in the New Jersey Supreme Court, Dr. Oberhand reiterated the contention that Mrs. O'Grady suffered no bleed.

> [T]he issue of a bleed, if and when it occurred and whether any bleed occurred at all prior to March 31, 1983, when Mrs. O'Grady suffered the ruptured aneurysm, was one of the many issues of fact resolved by the jury.

Brief and Appendix in Opposition to Plaintiffs' Petition for Certification on Behalf of Defendant Robert I. Oberhand, M.D., 6.

The difficulty with all this is that it is irrelevant. Dr. Oberhand's negligence did not turn on whether Mrs. O'Grady suffered a bleed. It turned on whether, had he taken proper history, he would have gained information from which

he should have suspected aneurysm and referred her to a neurologist for proper care.

D. The Questions from the Jury Evidence a Verdict Based on Extraneous Information

The jury made five inquiries, each in some way relating to whether Mrs. O'Grady's headache was constant or intermittent during the period March 4 to March 16, 1983. 26T231-2 to -6; 26T235-17; 26T237-21 to -24; 26T247-12, 13. Shortly after hearing an answer, the jury entered verdicts of no cause. It is fair to draw the inference from that sequence of events that the jury considered the question dispositive. See Kulbacki v. Sobschinsky, 38 N.J. 435, 452, 185 A.2d 835, 845 (1962); Pinter v. Parsekian, 92 N.J. Super. 392,

397, 223 A.2d 635, 638 (App. Div. 1966). But that question was never placed in issue by the parties. Witnesses and counsel for both sides spoke indifferently of "headache" and "headaches." Only two pieces of evidence were even tangentially relevant to the continuousness of the headache; neither was material in the sense of having been offered to that proposition.[5] The jury asked about both items. Those questions so confused trial counsel and the court that the wrong portion of the transcript

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5. These were Exhibit P-7, a graph prepared by petitioners' expert Dr. Bennett M. Derby, plotting Mrs. O'Grady's headache pain against time, and a passage in the cross-examination of Dr. Oberhand in which he first said that the headache was intermittent and then that he never asked Mrs. O'Grady whether it was intermittent or continuous. 25T76-2 to -21 (Oberhand, cross by O'Connor).

was read back.

It would have been possible to offer evidence that Mrs. O'Grady's headache was intermittent; respondents did not do so. It would have been possible to offer expert opinion that an intermittent headache might be less likely than a constant one to indicate prodromal bleeding;[6] respondents did not do that either. Instead, they satisfied themselves with the contention that there had been no bleed, and so left the jury to wonder what had happened to Mrs. O'Grady. Such an opportunity for specu-

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6. Intermittency is characteristic of cluster and migraine headaches which, like prodromal bleed headaches, can be of great intensity. B. Alpers, Clinical Neurology 144, 149 (5th ed. 1963); Graham, Seven Common Headache Profiles, 13 Neurology 16 (1963); S. Diamond & J. Dalessio, The Practicing Physician's Approach to Headache, 11-26 (3d ed. 1982).

lation is itself prejudicial. O'Connor v. Altus, 123 N.J. Super. 379, 386, 303 A.2d 329, 332 (App. Div. 1973), aff'd, 67 N.J. 106, 335 A.2d 545 (1975). In speculating, this jury consulted some private store of knowledge. It concluded (without evidence) that Mrs. O'Grady's headache was intermittent and then further concluded (without evidence) that intermittent headache and prodromal bleeding are mutually inconsistent.

II. Petitioners Were Denied Due Process in that Remedy for Jury Misconduct Depended on "Sheer Luck" and Remedy for Jury Mistake Took No Account of Judicial Confusion

There was judicial confusion and jury mistake at trial: Faced with a

pure causation defense, the judge first considered directed verdict on his own motion and then permitted the jury to dispose of that aspect of the case on a duty interrogatory and special verdict. There was clear and convincing circumstantial evidence of juror misconduct at trial: The jury, frustrated with an irrelevant defense, kept asking questions about facts not in evidence; when the uncomprehending court and counsel finally supplied it with an answer, it promptly returned a verdict.

What were petitioners' remedies? Review of the verdict was available under two standards; neither afforded due process.

A. Jury Misconduct and the "Sheer Luck" Rule

Like most jurisdictions, New Jersey

has rejected the doctrine of Vaise v. Delaval, 1 T.R. 11 (K.B. 1785); it permits post-trial examination of jurors, provided that examination is to extraneous influence, not mental process. See, e.g., State v. Kociolek, 20 N.J. 92, 100-05, 118 A.2d 812, 816-20 (1955) (Wm. J. Brennan, Jr., J.). New Jersey Court Rule 1:16-1[7] provides:

> Except by leave of court granted upon good cause shown, no attorney or party shall himself or through any investigator or other person acting for him interview, examine or question any grand or petit juror with respect to any matter relating to the case.

There is pertinent ethical provision:

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7. The rule is similar to equivalent provisions in other jurisdictions. See, e.g., U.S. Dist. Ct. for the Dist. of N.J., Local Rule 19B. The corresponding evidence law is conventional also. Compare N.J. Rule of Evid. 41 with Fed. R. Evid. 606(b).

> A lawyer shall not:
>
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
>
> (b) communicate ex parte with such a person except as permitted by law.

N.J. RPC 3.5.

Petitioners did not pursue this remedy; it was foreclosed. While New Jersey Court Rule 1:16-1 speaks the language of trial court discretion ("good cause shown"), the appellate cases informing that discretion make clear good cause is hard to find.

> Calling back jurors for interrogation after they have been discharged is an extraordinary procedure which should be invoked only upon a strong showing that a litigant may have been harmed by jury misconduct.

State v. Athorn, 46 N.J. 247, 250, 216 A.2d 369, 370 (1966).

Good cause is found when there is a volunteer informant. See, e.g., Scott v. Salem County Memorial Hosp., 116 N.J. Super. 29, 280 A.2d 843 (App. Div. 1971) (juror informed the court); State v. Onysko, 226 N.J. Super. 599, 545 A.2d 226 (App. Div. 1988) (juror contacted defense counsel); State v. Thompson, 142 N.J. Super. 274, 361 A.2d 104 (App. Div. 1976) (juror wrote letter to judge); State v. Weiler, 211 N.J. Super. 602, 512 A.2d 531 (App. Div.), certif. denied, 107 N.J. 37, 526 A.2d 130 (1986) (trial judge informed of jury misconduct); State v. Marchitto, 132 N.J. Super. 511, 334 A.2d 354 (App. Div. 1975) (juror informed defense counsel who contacted trial judge).

If no direct informant can be

found, no amount of circumstantial evidence, whatever its quality or quantity, will suffice. In State v. Koedatich, 112 N.J. 225, 548 A.2d 939 (1988), defendant, appealing conviction for the second of two murders, moved for questioning of jurors, offering a newspaper story quoting three jurors to the effect that they had known of defendant's connection with the first murder. 112 N.J. at 286-87, 548 A.2d at 971. The Supreme Court refused. "There is no juror affidavit in this case. Furthermore, we strongly believe that the contents of a single newspaper article, indisputably hearsay, cannot be the sole basis for the extraordinary procedure of post-trial jury interrogation." 112 N.J. at 289, 548 A.2d at 972.

The New Jersey Supreme Court has recognized the adventitiousness of this doctrine.

> It may appear odd to recognize a ground for the invalidation of a verdict while denying a litigant a chance to find out whether such an event perchance did occur. The fate of a defendant is thus made to depend upon sheer luck, that the wrongful event somehow comes to light. The weight of the criticism is appreciated, but when contending values clash in their demands, a balance must be struck, and the balance struck is not shown to be a poor one because in some unknowable cases there may be an injustice.

State v. LaFera, 42 N.J. 97, 107, 199 A.2d 630, 636 (1964).[8]

The rule is not a reasoned attempt to distinguish kinds of evidence on the basis of trustworthiness; once good

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8. Compare the efforts made to avoid prejudice from general press coverage in death cases. State v. Bey (I), 112 N.J. 45, 84, 548 A.2d 846, 886 (1988).

cause is shown, reversal of verdict may be had even if the evidence of misconduct developed is slight or circumstantial. Indeed, misconduct can be presumed from such conduct as consulting a dictionary.

> [T]he test whether a new trial will be granted is whether the extraneous matter could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge. If the extraneous matter has that tendency on the face of it, a new trial should be granted without further inquiry as to its actual effect. The stringency of the rule is not mere formalism; the rule is "imperatively required to secure verdicts based on proofs taken openly at the trial free from all danger of extraneous influences," Lamphear v. MacLean, 176 App. Div. 473, 162 N.Y.S. 432 (1916). On elementary principles the jury's verdict must be obedient to the court's charge and be based solely on legal evidence properly before the jury. McLeod v. Humeston & S. Ry. Co., 71 Iowa 138, 32 N.W. 246 (Sup. Ct.

Iowa 1887); Guntzer v. Healy, 176 App. Div. 543, 163 N.Y.S. 513 (1917).

Palestroni v. Jacobs, 10 N.J. Super. 266, 271, 77 A.2d 183, 185 (App. Div. 1950) (Wm. J. Brennan, Jr., J.A.D.).

Nor is the sheer luck rule supported by unequivocal policy considerations. Good cause has been found on the basis of evidence developed when an attorney "inadvertently" met a jury informant; it has been said that evidence obtained by conduct in violation of RPC 3.5 is admissible in a New Jersey Court Rule 1:16-1 proceeding. State v. Riley, 216 N.J. Super. 383, 390, 392, 523 A.2d 1089, 1092 (App. Div. 1987); see also Menza v. Diamond Jim's, Inc., 145 N.J. Super. 40, 44, 366 A.2d 1006, 1008 (App. Div. 1976) (Forelady

gave evidence to attorney not connected with case).

B. Jury Mistake Caused by Judicial Confusion and the "Miscarriage of Justice" Rule

1. Background

Under New Jersey Court Rule 4:49-1(a), a trial court judge may grant a motion whenever "having given due regard to the opportunity of the jury to pass on the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." Similar language describes the scope of review. New Jersey Court Rule 2:10-1.

The search for mistake, unlike that for misconduct, is not limited by reluctance to inquire into the condition of a juror's mind.

> The "mistake, passion, partiality or prejudice" standard has so often been used as a term of art that it is sometimes difficult to realize that it has always had literal significance; the verdict of a jury should be set aside as against the weight of the evidence when, upon consideration of all the evidence, it is manifest that the conclusion reached by the jury was a product of some form of irrationality rather than of a reasoned judgment.

M. Brochin & R. Sandler, Appellate Review of Facts in New Jersey, Jury and Non-Jury Cases, 12 Rutgers L. Rev. 482, 493 (1958).

Nor is there any requirement of a live informant. In particular, mistaken disposition of a case on a improper interrogatory has been found sufficient evidence of jury mistake. A jury interrogatory on an issue not in the case may be answered routinely rather than with deliberation, and that answer

should not be credited. Acken v. Campbell, 67 N.J. 585, 589, 342 A.2d 172, 174-75 (1975). An improper interrogatory compounds the misleading effect on the jury of an erroneous charge. Gautam v. DeLuca, 215 N.J. Super. 388, 396, 521 A.2d 1343, 1347 (App. Div. 1987). A verdict entered in answer to such an irrelevant interrogatory bespeaks "confusion or mistake on the part of the jury." Menza v. Diamond Jim's, Inc., 145 N.J. Super. 40, 45, 366 A.2d 1006, 1008 (App. Div. 1976). A jury finding unsupported by evidence is based "on impermissible factors, extraneous to the proofs in the record or reasonable inferences therefrom." Williams v. Page, 160 N.J. Super. 354, 366, 389 A.2d 1012, 1018 (App. Div.

1978).

2. Trial Court Confusion and and the Standard of Review

The standard by which a trial court judge evaluates a motion for a new trial under New Jersey Court Rule 4:49-1(a) and that by which his decision is reviewed on appeal under New Jersey Court Rule 2:10-1 are, save for deference to credibility, the same. S. Pressler, Rules Governing the Courts of New Jersey R. 2:10-1 comment 2, at 406 (1990); Dolson v. Anastasia, 55 N.J. 2, 7, 258 A.2d 706, 708-09 (1969). The "miscarriage of justice" language, and a briefly-used predecessor phrase ("manifest denial of justice under the law"[9]), were adopted to replace the

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9. This wording was promulgated as part of the general revision of 1969. It was amended in 1971 to reflect Dolson. S. Pressler, Rules Governing

former "mistake, passion, partiality or prejudice" test because that language had become entangled in the question (disposed of by Dolson) of whether appellate court consideration of new trial motions should be narrower than that of the trial courts. Compare Hager v. Weber, 7 N.J. 201, 210, 81 A.2d 155, 160 (1951) with Hartpence v. Grouleff, 15 N.J. 545, 548, 105 A.2d 514, 517 (1954). It was only the scope of review problem that produced the difficulty, not the underlying new trial test itself. The older standard informs the new; a trial court in New Jersey may set aside a verdict under R. 2:10-1 for mistake, just as its predecessors have

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the Courts of New Jersey R. 2:10-1 comment 2, at 406 (1990).

done since Vunck v. Hull, 3 N.J.L. *578, *581 (Sup. Ct. 1809). By reason of Dolson v. Anastasia, 55 N.J. 2, 7, 258 A.2d 706, 708 (1969), appellate courts use the same rubric to perform the same task.

The difficulty is that where jury mistake is the fruit of confusion on the part of the trial judge, the unitary "miscarriage of justice" language, by encouraging appellate judges to place themselves in the shoes of trial judges, shields them from the trial courts' errors in analysis.

The appellate courts have recognized some difference in decisional process flowing from their different standpoint.

> An appellate court is unable to get the "feel of the case" and lacks

> the opportunity to observe and hear the witnesses who appear before the trial judge and jury. Therefore, since its scope of review has these inherent limitations, an appellate court must make allowance for factors which were evident to the trial court and jury but which cannot be gleaned from the written record.

Fritsche v. Westinghouse Electric Corp., 55 N.J. 322, 330, 261 A.2d 657, 661 (1970).

By the same analysis, an appellate court has advantages it cannot abandon without committing grave injustice. Here, only close analysis of the transcript can show the degree to which the trial judge and counsel misconceived the relevance of Dr. Oberhand's evidence, the nature of Dr. DiLallo's defense and the danger hinted at in the jury's five questions. The unitary standard of review fails in that it does

not command the Appellate Division to look beyond the opinion below and analyze the transcript for evidence that not only the jury, but the trial court, was confused by the proceedings. Trial judges are human and occasionally blunder; the policy of deference to trial court judgments as to credibility does not extend to ignoring those blunders.

C. Petitioners Were Denied Due Process of Law

Petitioners here were put to a beggars' choice. They could have attempted to offer their clear and convincing circumstantial proof of jury misconduct as good cause for a New Jersey Court Rule 1:16-1 motion, knowing that such a motion was bound to lose.

In the alternative, they could have pursued an appeal under the "miscarriage of justice" standard of New Jersey Court Rule 2:10-1, knowing that the New Jersey courts are loath to inquire into jury mistake produced by trial court confusion. They chose this option and lost.

New Jersey has no federal constitutional obligation to give petitioners a jury trial. Walker v. Sauvinet, 92 U.S. 90, 92-93 (1876) (Seventh Amendment not incorporated by Fourteenth Amendment privileges and immunities clause). But if it does give such a trial, the verdict should be free of extraneous influence. Fxclusion of evidence of such misconduct violates "the plainest principles of justice."

Mattox v. United States, 146 U.S. 140, 147 (1892) (criminal).

New Jersey has no constitutional obligation to grant petitioners any appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). If it does so, that appeal must consider the trial judge's misunderstanding of the fundamental issues of the case.

The jury in the present matter was misled by the court as to the nature of petitioners' case against respondent Dr. DiLallo and was unassisted by the rule of relevance in hearing their case against respondent Dr. Oberhand. The jury cannot be blamed for seeking to do justice in the best way it could. But justice done dehors the evidence denies due process of law. Without punctilious

judicial supervision, the jury could not perform its task.

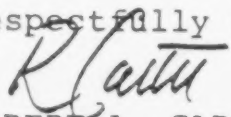
> A jury, properly speaking, is an appendage of a court, a tribunal auxiliary to the administration of justice in a court . . . a presiding law tribunal is implied, and . . . the conjunction of the two is the peculiar and valuable feature of the jury trial; and, as a necessary inference . . . a mere commission though composed of twelve men, can never properly be regarded as a jury.

Capital Traction Co. v. Hof, 174 U.S. 1, 15 (1898).

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,



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February 5, 1990

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* Counsel's application for admission to the Bar of this Court is pending; he signs these papers by courtesy of the Clerk of this Court, who has granted permission therefor.

APPENDIX

SUPREME COURT OF NEW JERSEY
C-26 September Term 1989

30,495

ROSELLA & FRANK O'GRADY,
Plaintiffs-Petitioners,

vs.

ON PETITION
FOR
CERTIFICATION

ROBERT I. OBERHAND, M.D.,
Defendant-Respondent,

and

JOSEPH DILALLO, M.D., et al.,
Defendants.

To the Appellate Division,
Superior Court,

A petition for certification of the judgment in A-4478-86T1 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 6th day of September, 1989.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

I hereby certify that
the foregoing is a
true copy of the
original on file in
my office.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4478-86T1

ROSELLA and FRANK O'GRADY,

Plaintiffs-Appellants,
Cross-Respondents,

v.

ROBERT I. OBERHAND, M.D.

Defendant-Respondent,
Cross-Appellant,

and

JOSEPH DiLALLO, M.D.,

Defendant-Respondent,

and

PAUL R. FRANZ, D.C.;
PHYLLIS LaFLAMME, R.N.;
MARY C. MAJOR; and
MARY ANN HAMBURGER,

Defendants.

ORIGINAL FILED
Apr. 20 1989

Emille R. Cox,
Esq.
Acting Clerk

Argued April 5, 1989 --
Decided Apr. 20, 1989

Before Judges Gaulkin, Bilder and
R.S. Cohen.

On appeal from the Superior Court of New Jersey, Law Division, Union County.

Robert A. Carter argued the cause for appellants, cross-respondents (Mr. Carter, attorney; Judith E. Stein, of counsel and on the brief).

John P. McGee argued the cause for respondent, cross-appellant Robert I. Oberhand, M.D. (McDermott, McGee & Ruprecht, attorneys; Mr. McGee, on the brief).

Neil Reiseman argued the cause for respondent Joseph DiLallo, M.D. (Reiseman, Mattia & Sharp, attorneys; Mr. Reiseman, of counsel; Jane S. Kelsey and Kenneth P. Westreich, on the brief).

PER CURIAM

A careful review of the record and a consideration of the contentions urged by the plaintiff, in light of the applicable law, satisfies us that all of said contentions and issues raised are clearly without merit. R. 2:11-3(e)(1)(A) and (E). See Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969). We add only that we will not consider

grounds based purely on speculation. See State v. Wilkerson, 38 N.J. Super. 166, 168 (App. Div. 1955). The cross appeal is moot.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ R. Emille Cox
Acting Clerk

The following is a reprint of the oral opinion of the Honorable Lawrence Weiss of the Superior Court of New Jersey, Law Division, denying plaintiffs' motion for a new trial, taken from the stenographic transcript of motion proceedings, April 24, 1987, page 10 line 4 to page 20 line 1:

> Well, this is a motion for a new trial in regard to this matter where the jury rendered a verdict of was Dr. Oberhand professionally negligent. They voted that he was not professionally negligent. And then when I said was Dr. DiLallo professionally negligent, they voted that he was not professionally negligent. The case was tried over a period of days.
>
> There was produced expert testimony. There was factual testimony and the records were placed or gone over during examination and cross-examination of all the witnesses.
>
> The rule that the court must determine is, the trial judge shall grant the motion if, after having given due regard of the jury to pass upon the credibility of the witnesses, it clearly appears that

there was a miscarriage of justice.

Under the facts of this case, this is a case in which the plaintiff has had a severe disabling condition as a result of an intercerebral hemorrhage. The question -- there was a serious question concerning what caused that hemorrhage and when it first appeared. The plaintiff's testimony through her husband, that is Mr. O'Grady, testified that sometime on Friday afternoon she said she had "the worst headache I ever had in my life," if I recollect the testimony, and that she was disabled to the point where she had to lay down for a period of time, Friday night, Saturday, Sunday. By Sunday afternoon the headache was diminishing to the point where she was able to come downstairs and she had some meal and watched television with her family and Monday morning she called Dr. Oberhand and then made an appointment and because Dr. Oberhand had been treating her since nineteen hundred seventy-six for various conditions that all had to do with the resulting headaches. In fact, she was being treated for, there was evidence of migraine headaches, evidence of headaches as a result of sinusitis in which they were considering an SMR or submucosa resection. Thereafter when she came to the doctor's office, she was capable of driving herself; she was capable of and appeared at the office not to be in extreme diffi-

culty; she was able to converse with the doctor, be examined by the doctor, and the doctor had his records of her previous conditions and, in fact, had an opportunity to observe the patient and the doctor's testimony was that the patient said to him those headaches are back again.

Now, whether or not the headache was of such intensity as it was the worst headache I ever had in my life, or whether or not those headaches were back again, is a credibility issue. I recognize that during the course of the examination of one of the defendant's experts a learned treatise was used only for credibility, not for substantive evidence, in which the issue was, the quote out of that textbook was, doctor, isn't it a fact that one of the signs of this type of condition, that is a leaking aneurism, would have been -- the patient might, the patient would say or refer to this was one of the worst headaches I ever had or this was the worst headache I ever had in my life, and the expert agreed that would have been.

But the jury is the trier of the fact. They become the judges of the facts, and I explained to them at the commencement of the trial, and I re-explained to them at the end of the trial, it is the function of the trier, the judges of the facts, to resolve issues of

credibility. To make that evaluation based upon many factors: The appearance and demeanor of the witness on the stand; do they have an interest in the outcome of the case; do they have a possible bias in favor of the side for whom they testified; are they supported or contradicted by other evidence; is their testimony reasonable or unreasonable in light of all the other evidence?

That credibility function even applies in terms of expert witnesses. The jury was told in the charge that I gave to them at the end of the case that it is one the functions of the jury to accept or not accept the testimony of an expert witness; that it's peculiarly within the function of the jury in evaluating the testimony of witnesses and expert witnesses who are allowed to give opinions because of their training, education and experience that bring to the jury something that most lay people are incapable of understanding, and in this case there cannot -- the jury cannot understand or draw their own standard, but must listen -- and the standard that applies must be that which is given to them by expert testimony. But that does not mean that they have to accept the expert testimony. The charge is clear. You are not bound by such expert's opinion, but you should consider each opinion and give it the weight to which you deem it entitled,

whether it be great or slight, or you may reject it.

In examining each opinion, you may consider the reasons given for it, if any. You may also consider the qualifications and credibility of the expert. It is always within the special function of the jury to decide whether the facts on which the answer of an expert is based actually exists. The value of the weight -- or weight of the opinion of the expert is dependent upon and no stronger than the facts on which it is predicated.

In examining an expert witness, counsel may propound to him the type of question known in the law as a hypothetical question. By such a question the witness is asked to assume to be true a hypothetical state of facts to be given an opinion based upon that assumption.

And then, of course, I told them if there is conflicting expert testimony, they have to evaluate that and resolve that.

The jury listened to and had an opportunity to hear all the testimony and the experts. The jury was told that merely because there is a bad result, that does not mean that a physician has committed professional negligence. The jury is told that you can't hide behind that, but that does not mean that he's professionally

negligent if a bad result occurs if he is treating a patient.

The jury is also told that if there is a judgment, the physician makes a judgment of two or more different decisions. If it's a wrong judgment, it's still proper as long as the judgment is not a deviation from accepted medical practice.

Dr. Oberhand testified concerning how long he treated the patient. There was evidence clearly that the -- that a few days before the plaintiff had hurt her neck during a aerobic-type of exercise and there was evidence that came out that, although Dr. Oberhand didn't know it, she was also seeing a chiropractor to alleviate it.

I bring that out because although counsel agrees that to some degree -- well, I think counsel does agree Dr. DiLallo, there was no evidence, and doesn't raise an issue of Dr. DiLallo because Dr. DiLallo received a letter and even though the case was tried and Dr. DiLallo's attorney clearly agrees that the issue was he should have read it and if he didn't read it, if he didn't read it, you assume he should have read it and, therefore, what would he have done.

And the evidence was clear, by the time he got the letter, if he

had called Mrs. O'Grady she would have said because the chiropracter, she had been treated by a chiropractor, the headaches were gone, and that his testimony, the expert, is clear, the doctor wouldn't call her in because she was having headaches that were gone. They were treated. The symptomatology based upon appears to be, at least to some degree, caused by an arthritic condition that was aggravated. A pre-existing arthritic condition was aggravated by doing, to some degree, I'm saying it because we are not dealing with whether or not an aneurism, an intercranial hemorrhage, a leaking hemorrhage, but that there was this arthritic, latent arthritic condition, aggravated by doing the type of aerobic exercises that also produces headaches, cervical headaches, and running up to the head. So that there's no question Dr. DiLallo, from the jury, had every right, and the evidence was clear, but I think the evidence was clear on both sides, as to both doctors.

Dr. Oberhand saw the patient twice. The first time he had his records. She was not a new patient. Not only that, but the testimony was, which supports, more than supports, but had the defend-ant Dr. Oberhand had the burden of proving by a preponderance of the credible evidence that he was not professionally negligent, I think

he would have met that burden, had the burden been on the other side. He saw her on the 7th, had a history and treated her for over -- since 1976 and, in fact, they had discussed prior to having the submucosa resection and subsequent thereto contacted and told her maybe that's what we should be doing because those headaches are back again and that's the step to take and, in fact, Mr. O'Grady, the testimony was, asked Dr. Oberhand to write a letter, since he wanted to present it to his medical insurance company to make -- to get a determination of what was going to be paid in terms of the submucosa resection because as -- it was clear that they wanted to know, the reasons of which were not brought before the jury, but in order to get the cost valued because most insurance medical pays 80 percent of the cost of that and that, therefore, everyone understood and the doctor -- and that he thereafter saw her again telling her to come back on the 14th and then he was then feeling, well, maybe it wasn't this type of headache, which was as a result of sinusitis or the deviated septum, which she had, and then wrote a letter and said, look, maybe it's arthritic in your neck, your neck condition. But at all times examined her to some degree, had the previous history and what we fail sometimes to realize is no profession, whether it be an engineer, a lawyer or a doctor, is infallible.

The question is: Did he deviate from accepted standards of that profession? I find that the jury, had I been sitting on the jury, having listened to all the evidence, I would have voted the same way that the jury voted. I believe that the jury had all the evidence.

I don't say this as an offhanded remark because I said it at the end of the case after I charged the jury and the jury commenced their deliberations. Before the verdict came out, I said to all counsel on the record then that I felt that that was the best tried case that has ever been tried before me by three of the most competent lawyers that I have ever had before me that was able to give the jury all the evidence they were supposed to hear and that the jury had an opportunity to hear and focus and make their decision. I said it before the case was -- before they deliberated, I had no idea what the jury -- and the jury had an opportunity to render that.

I believe that the verdict is not against the weight the of the evidence. I believe there is not a miscarriage of justice. I believe that this is an unfortunate situation where people -- that the human body is a delicate mechanism that none of us truly understand, even doctors. Therefore the jury had a right under these terms to evaluate

whether or not Dr. Oberhand deviated. I find that the evidence was clearly sufficient to the jury to bring in the verdict they did. Therefore your motion for new trial is denied.

SUPREME COURT OF THE UNITED STATES

No. A-403

Rosella O'Grady, et al.,

Petitioners

v.

Robert I. Oberhand, et al.

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including February 5, 1990.

/s/William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 27
day of November, 1989.

ROBERT I. OBERHAND, F.A.C.B., P.A.
320 Lenox Avenue
Westfield, New Jersey 07090
(201) 233-5500

March 14, 1983
Re: Rosella O'Grady

Joseph A. DiLallo, M.D.
Summit Family Medical Center
396 Morris Avenue
Summit, NJ 07901

Dear Dr. DiLallo:

I examined Mrs. O'Grady on March 14, 1983. You are aware of her long history of allergic rhinitis, aggravated by significant deviations of her nasal septum.

Mrs. O'Grady is presently complaining of severe, disabling headaches. Pain begins at the base of the skull, and radiates over the top of her head to her forehead. She also has some pain in her cheeks. She has pain radiating down the cervical spinal area posteriorly. She is under treatment by a chiropractor for diffuse spinal problems.

Otolaryngologic examination on March 14, demonstrates a blood pressure in her right arm in the sitting position of 134/94. The ear canals and drums are clear. Although her septum is severely deviated, there is no nasal discharge, allergic mucosal edema, or complaints of nasal blockage. Examination of the nasopharynx, throat, larynx and neck

reveals no abnormalities. There is no tenderness over the temporomandibular joint areas. Because Mrs. O'Grady was complaining of recent left ear blockage with hearing loss, audiometry was performed. A moderate right sensorinueral hearing loss with a precipitous high tone dropoff is noted, which Mrs. O'Grady has been aware of for several years. In addition, there is a mild low tone left conductive hearing loss. There is early high tone sensorineural hearing loss in the left ear as well. Tympanometry reveals normal middle ear pressures bilaterally.

Sinus x-rays have been ordered, and the results are pending. I have referred Mrs. O'Grady back to you for treatment of cervical arthritis with medication or possibly with orthopedic consult for further evaluation. If her sinus x-rays are anything but normal, I will inform you immediately. I do not feel that her pains are related to an otolaryngologic problem at the present time. I will recheck her hearing in two months.

If you have any questions, please do not hesitate to call me.

Respectfully,

/s/Robert I.Oberhand, M.D.
Robert I. Oberhand, M.D.

RIO: vl
cc: Rosella O'Grady

Affidavit of Frank O'Grady

Robert A. Carter, Esq.
15 Washington Street
Newark, N.J. 07102
(201) 648-5216
Attorney for Plaintiff-Appellants

ROSELLA & FRANK O'GRADY, Plaintiff-Appellants, v. ROBERT I. OBERHAND, M.D., et al., Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Appellate # A-4478-86-T1 Civil Action AFFIDAVIT

State of New Jersey)
) ss:
County of Essex)

Frank O'Grady, of full age, being duly sworn, according to law, upon his oath, deposes and says:

1. I am a plaintiff in the above matter.

2. Referring to the afternoon of Thursday, March 26, I remember clearly that shortly after the jury retired for deliberation, and this was approximately 3:05 p.m., shortly after that I heard loud voices coming from the jury room. Then around 3:35 p.m., the jury sent out the note asking about the headache. A

little while later, the jury sent out another question.

3. I also recall that on March 27 things started with the judge reading some of Dr. Oberhand's deposition. He was answering the jury's questions from the previous day. Then they went back in, and in a little more than an hour, they came back with the verdict.

4. In reference to the jury asking for my deposition -- on Thursday, March 26, sometime after they sent out the note asking, "if P-7 referred to Rosie's headache," and "in Oberhand's deposition does he say continuous headache for 12 days or does he say a series of disabling headaches," the jury sent out a note asking to see my deposition. The judge's comment was, "I can't give them that," and he also said to his clerk, "Tell them I can't give them that." I called O'Connor that night and told him I thought the reason the jury wanted it was to refer to the one area where McGee challenged me on the question in my deposition, "did the headache continue in the period from March 14th to March 31st?" to which my answer was "yes."

5. Referring to the transcript -- March 23, page 44, starting on line 22 -- my answer is not stated correctly. I remember quite clearly that what I said was, "yes, it did 'cause [because] as I told you, it ended on the 16th, which is between the 14th and the 31st." Then, McGee's question, starting on line 24, is mis-typed. His question was, "it didn't persist until the 31st, is that what you are saying, is that so?" And

my answer on page 45, line 1 is appropriately, "yes."

BY:/s/Frank O'Grady
FRANK O'GRADY

Sworn and subscribed before
me on July 4th, 1988

/s/ Robert A. Carter
AN ATTORNEY AT LAW OF
THE STATE OF NEW JERSEY

The following is a reprint of an excerpt from Judge Weiss' charge to the jury, concerning proximate cause, taken from the stenographic transcript of the trial proceedings, March 26, 1987, page 198 line 10 to page 199 line 5:

> Now, you have just heard me use the term proximate cause. By proximate cause it means that the negligence of the defendant in this case, either or both doctors, was an efficient cause of the condition. That is a cause which necessarily set the other causes in motion, and was a substantial factor in bringing the condition about. And you have to make that finding as to whether or not this condition, what happened on March 31st, is a failure of the doctors.
>
> If you find there is a deviation whether or not that brought about the condition, it could have been prevented, is one of the facts. Again, I am trying to put it in simple terms. I am not telling you how you should decide this. You heard the physicians. You heard their opinions, and their testimony. And I am not going to recapitulate that.

Rider 2 from Pretrial Order

FACTUAL AND LEGAL CONTENTIONS OF DEFENDANTS JOSEPH DiLALLO, M.D., PHYLLIS LaFLAMME, RN, MARY C. MAJOR, MARYANN HAMBURGER

At the times referred to in the complaint, Dr. DiLallo was a duly licensed physician of the State of New Jersey, specializing in internal medicine. The plaintiff began treatment with Dr. DiLallo in or about 1972. Over the course of the next ten years, Dr. DiLallo or his associates saw the plaintiff on several occasions for treatment of various medical problems, including chest pain, bursitis, upper respiratory tract infections, elbow pain, etc. The only time Mrs. O'Grady complained of a headache was during a telephone conversation on January 9, 1981. She reported to Dr. DiLallo that she had been taking indocin which had been prescribed by her orthopedist Dr. Morrison. Dr. DiLallo also prescribed fiorinal, and this rectified the situation.

Dr. DiLallo last saw the plaintiff on August 24, 1982. At that time, the plaintiff's tamperature and blood pressure were recorded. Dr. DiLallo was not aware of the plaintiff's severe headaches, except by a letter by Dr. Oberhand dated March 14, 1983,

inadvertently filed prior to Dr. DiLallo's review. This letter concludes " I have referred Mrs. O'Grady back to you for treatment of cervical arthritis with medication or possibly with orthopedic consult for further evaluation. If her sinus x-rays are anything but normal I will inform you immediately. I do not feel that her pains are related to an otolaryngologic problem at the present time. I will re-check her hearing in two months."

It is plaintiff's position that this alleged office mismanagement constituted a deviation from accepted standards and that based on Dr. Oberhand's letter, Dr. DiLallo should or could have provided follow-up medical attention to the plaintiff. It is Dr. DiLallo's position that even if he had seen the letter, he may not have been prompted to take follow-up measures at that point. In addition, no call was ever received from Dr. Oberhand concerning his examination of Mrs. O'Grady or the fact that he was referring the plaintiff back to Dr. DiLallo for further evaluation. Further, the plaintiff had not been seeing Dr. DiLallo at all in early 1983, and she never contacted him at all concerning the nature and severity of her headaches.

The defendant, Joseph DiLallo, M.D., denies any negligence or malpractice with respect to the

care and treatment which he afforded to the plaintiff at any time and specifically alleges that the plaintiff was cared for totally in accordance with accepted medical standards.

It is admitted that at the times referred to in the complaint, defendant Phyllis LaFlamme, RN, was a duly licensed registered nurse of the State of New Jersey who was employed as a " back office " nurse in Dr. DiLallo's office in or about March of 1983. At that time, Nurse LaFlamme was primarily responsible for direct patient care. She had no responsiblity for opening the mail and she does not recall seeing the letter which was received from Dr. Oberhand. She was also not responsible for filing the letter in the patient's file. Nurse LaFlamme denies any negligence or malpractice with respect to the caring and treatment which was afforded to the plaintiff at any time and specifically alleges that the plaintiff was cared for totally in acccordance with accepted medical standards.

At the times referred to in the complaint, defendant Mary C. Major was a medical assistant and was employed by defendant Joseph DiLallo, M.D., in or about March of 1983. At that time, she was charged with escorting the patients from the outer office into the examining rooms. It was not her duty to open the mail. She has no

recollection of the Oberhand letter and she was not the individual who filed the letter in the plaintif's chart.

This defendant, Mary C. Major, denies any negligence or malpractice with respect to the care and treatment which was afforded to the plaintiff, at any time, and specifically alleges that the plaintiff was cared for totally in accordance with accepted medical standards.

At the times referred to in the complaint, defendant Maryann Hamburger was the office manager for Dr. DiLallo. At that time, her duties were to schedule patients, acknowledge when patients came into the office, bill patients, deposit checks and open the mail. If there was a letter or report from a doctor, she would place the letter on the counter where it would be clipped to the patient chart and left on the doctor's desk. She does not recall ever seeing the letter from Dr. Oberhand nor does she recall filing the letter in the plaintiff's file. The defendant, Maryann Hamburger, denies any negligence or malpractice with respect to the care and treatment which was afforded to the plaintiff, at any time, and specifically alleges that the plaintiff was cared for totally in accordance with accepted medical standards.
